

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Kevin Wilharm

NOTICE OF HEARING AND  
MOTION FOR RELIEF FROM  
AUTOMATIC STAY

Debtor

Chapter 7, Case No. 04-33849  
-----

TO: Kevin Wilharm, INCLUDING TRUSTEE AND OTHER INTERESTED PARTIES

1. Washington Mutual Home Loans, Inc., n/k/a Washington Mutual Bank, FA (“Movant”), a corporation, by its attorneys, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion at 9:30 am on September 27, 2004, in Courtroom 228A, 316 North Robert Street, St. Paul, MN 55101 or as soon thereafter as counsel can be heard.

3. Any response to this motion must be filed and delivered not later than on September 22, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than September 16, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, FRBP Nos. 5005 and Local Rule 1070-1. This is a core proceeding. The Chapter 7 case was filed on June 30, 2004, and is now pending in this court.

5. This motion arises under 11 U.S.C. § 362 and Federal Rules of Bankruptcy Procedure 4001, and is filed under Federal Rules of Bankruptcy Procedure 9014 and Local Rules 1201-1215. Movant requests relief with respect to the property of Debtor, subject to a mortgage to Movant.

6. Debtor above-named is the owner of certain real property located at 12042 755th Avenue, Le Roy, MN 55951, legally described as follows, to-wit:

Commencing at a point 23 rods East of the SW Corner of the SE 1/4 of Section 20, Township 101 North, Range 14 West; thence East 40 rods; thence North 28 rods; thence West 40 rods; thence South 28 rods to the point of beginning and there terminating; except a part of said parcel described as follows: Beginning at a point 1,039.5 feet (63 rods) East of the South Quarter Corner of Section 20, Township 101 North, Range 14 West; thence North at right angles to the South line of Section 20, 462 feet (28 rods); thence West parallel to said South line 380.6 feet; more or less, to the West line of the SE 1/4 of the SW 1/4 of said SE 1/4; thence South along a West line 462 feet, more or less, to the South line of Section 20; thence East along said South line 380.6 feet, more or less, to the point of beginning for the parcel herein excepted. Also excepting from the real estate to be conveyed the following described parcel: Commencing at a point 23 rods East of the SW Corner of the SE 1/4 of Section 20, Township 101 North, Range 14 West; thence East to the Westerly right-of-way of the existing Township road; thence northwesterly along the westerly right-of-way of said existing Township Road to a point directly north of the place of beginning; thence South to the point of beginning and there terminating. Subject to easement, restrictions and reservations of record.

7. The indebtedness of Kevin Wilharm is evidenced by a Promissory Note and Mortgage dated July 5, 2001, filed of record in the Mower County Recorder's office on July 11, 2001, and recorded as Document No. 493619. A true and correct copy of the front page of the recorded mortgage is attached as Exhibit A. Said mortgage was subsequently assigned to Movant.

8. The Debtor has failed to pay monthly mortgage payments since August 1, 2003, and is in default in the amount of \$12,445.92 together with reasonable attorneys fees and costs

incurred pursuant to the note and mortgage. Debtor has failed to make any offer of adequate protection. Accordingly, Movant's interest is inadequately protected.

9. The total amount due under the mortgage and note as of the date of hearing is \$115,275.40.

10. The Debtor has estimated the value of the homestead as \$90,000.00, and accordingly, Debtor has no equity in the premises and the property is not necessary to an effective reorganization.

11. By reason of the foregoing, Movant is entitled to have the automatic stay lifted and vacated so it can recommence the mortgage foreclosure action pursuant to Minnesota Statutes.

WHEREFORE, Movant by its undersigned attorney, moves the Court for an Order that the automatic stay provided by 11 U.S.C. Section 362 (A) be terminated to permit Movant to foreclose its mortgage on the subject property, and for such other and further relief as may be just and equitable.

Dated: September 7, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo  
Paul A. Weingarden, #115356  
Brian H. Liebo #277654  
Attorney for Movant  
4500 Park Glen Road, #120  
Minneapolis, MN 55416  
(952) 925-6888

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

IN RE:

Kevin Allen Wilharm

AFFIDAVIT OF PETITIONER

Debtor

Chapter 7, Case No. 04-33849  
-----

STATE OF GEORGIA

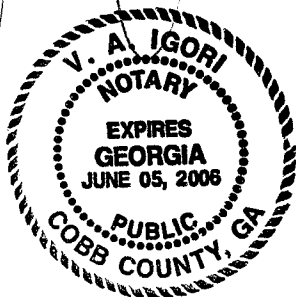
COUNTY OF FULTON

Amy L. Schoper, being first duly sworn, deposes and states she is authorized representative of Movant and has direct real-time access to the computer records of Movant which are maintained in the ordinary course of business and that she has read the annexed Notice of Hearing and Motion for Relief From Automatic Stay, and that it is true of her knowledge to the best of her information.

Amy L. Schoper

Subscribed and sworn to before me this  
20th day of August, 2004.

Notary Public [Signature]



402875093

OFFICE OF COUNTY RECORDER  
MOWER COUNTY MINNESOTA

DOCUMENT NO. 493619

I hereby certify that the within instrument was filed in this  
office for record on 7/11/2001 at 10 AM PM  
Susan M. Davis, County Recorder

*Jill Cordes*  
Deputy

# 30160  
REGISTRATION TAX HEREON OF \$241.50  
PAID THIS 11th DAY OF July 2001  
Jill Cordes, CO. TREAS.

[Space Above This Line For Recording Data]

MORTGAGE

Return To:  
FIRST SAVINGS BANK

PO BOX 85614 - 500 E 60TH ST  
N, SIOUX FALLS, SD  
57118-5614

DEFINITIONS

Words used in multiple sections of this document are defined below and other words are defined in Sections 3, 11, 13, 18, 20 and 21. Certain rules regarding the usage of words used in this document are also provided in Section 16.

(A) "Security Instrument" means this document, which is dated July 5, 2001, together with all Riders to this document.

WILHARM KEVIN 3008612  
MINNESOTA-Single Family-Fannie Mae/Freddie Mac UNIFORM INSTRUMENT

Form 3024 1/01

WMP-S(MN) (0005)

Page 1 of 15 MW 05/00

Initials: KW PW

WMP MORTGAGE FORMS - (000)521-7291



(B) "Borrower" is KEVIN WILHARM and PATRICIA WILHARM, husband and wife

Borrower is the mortgagor under this Security Instrument.

(C) "Lender" is FIRST SAVINGS BANK

Lender is a

organized and existing under the laws of the United States of America  
Lender's address is PO BOX 85614 - 500 E 60TH ST N, SIOUX FALLS, SD 57118-5614

Lender is the mortgagee under this Security Instrument.

(D) "Note" means the promissory note signed by Borrower and dated July 5, 2001

The Note states that Borrower owes Lender One Hundred Five Thousand and no/100

Dollars  
(U.S. \$105,000.00) plus interest. Borrower has promised to pay this debt in regular Periodic Payments and to pay the debt in full not later than August 1, 2031

(E) "Property" means the property that is described below under the heading "Transfer of Rights in the Property."

(F) "Loan" means the debt evidenced by the Note, plus interest, any prepayment charges and late charges due under the Note, and all sums due under this Security Instrument, plus interest.

(G) "Riders" means all Riders to this Security Instrument that are executed by Borrower. The following Riders are to be executed by Borrower [check box as applicable]:

<input type="checkbox"/> Adjustable Rate Rider	<input type="checkbox"/> Condominium Rider	<input type="checkbox"/> Second Home Rider
<input type="checkbox"/> Balloon Rider	<input type="checkbox"/> Planned Unit Development Rider	<input type="checkbox"/> 1-4 Family Rider
<input type="checkbox"/> VA Rider	<input type="checkbox"/> Biweekly Payment Rider	<input type="checkbox"/> Other(s) [specify]

(H) "Applicable Law" means all controlling applicable federal, state and local statutes, regulations, ordinances and administrative rules and orders (that have the effect of law) as well as all applicable final, non-appealable judicial opinions.

(I) "Community Association Dues, Fees, and Assessments" means all dues, fees, assessments and other charges that are imposed on Borrower or the Property by a condominium association, homeowners association or similar organization.

(J) "Electronic Funds Transfer" means any transfer of funds, other than a transaction originated by check, draft, or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, computer, or magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, transfers initiated by telephone, wire transfers, and automated clearinghouse transfers.

(K) "Escrow Items" means those items that are described in Section 3.

WILHARM KEVIN

3008612

Initials: *kw pw*

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2220-S(MN) (0000)

Page 2 of 15

Form 3024 1/01

(L) "Miscellaneous Proceeds" means any compensation, settlement, award of damages, or proceeds paid by any third party (other than insurance proceeds paid under the coverages described in Section 5) for: (i) damage to, or destruction of, the Property; (ii) condemnation or other taking of all or any part of the Property; (iii) conveyance in lieu of condemnation; or (iv) misrepresentations of, or omissions as to, the value and/or condition of the Property.

(M) "Mortgage Insurance" means insurance protecting Lender against the nonpayment of, or default on, the Loan.

(N) "Periodic Payment" means the regularly scheduled amount due for (i) principal and interest under the Note, plus (ii) any amounts under Section 3 of this Security Instrument.

(O) "RESPA" means the Real Estate Settlement Procedures Act (12 U.S.C. Section 2601 et seq.) and its implementing regulation, Regulation X (24 C.F.R. Part 3500), as they might be amended from time to time, or any additional or successor legislation or regulation that governs the same subject matter. As used in this Security Instrument, "RESPA" refers to all requirements and restrictions that are imposed in regard to a "federally related mortgage loan" even if the Loan does not qualify as a "federally related mortgage loan" under RESPA.

(P) "Successor in Interest of Borrower" means any party that has taken title to the Property, whether or not that party has assumed Borrower's obligations under the Note and/or this Security Instrument.

#### TRANSFER OF RIGHTS IN THE PROPERTY

This Security Instrument secures to Lender: (i) the repayment of the Loan, and all renewals, extensions and modifications of the Note; and (ii) the performance of Borrower's covenants and agreements under this Security Instrument and the Note. For this purpose, Borrower does hereby mortgage, grant and convey to Lender and Lender's successors and assigns, with power of sale, the following described property located in the

of Mower  
SEE ATTACHMENT "A"

County [Type of Recording Jurisdiction]  
[Name of Recording Jurisdiction];

Parcel ID Number:  
12042 755th Ave  
LeRoy  
("Property Address"):

which currently has the address of  
[Street]  
[City], Minnesota 55951 [Zip Code]

WILHARM KEVIN  
6(MN) (0005)

3008612  
Page 3 of 16

0  
Initiate: KW PAW  
Form 3024 1/01

ATTACHMENT "A"

COMMENCING AT A POINT 23 RODS EAST OF THE SOUTHWEST CORNER OF THE SOUTHEAST QUARTER OF SECTION 20, TOWNSHIP 101 NORTH, RANGE 14 WEST; THENCE EAST 40 RODS; THENCE NORTH 28 RODS; THENCE WEST 40 RODS; THENCE SOUTH 28 RODS TO THE POINT OF BEGINNING AND THERE TERMINATING, MOWER COUNTY, MINNESOTA; EXCEPTING THEREFROM THE FOLLOWING TWO TRACTS OF LAND;

PARCEL I: BEGINNING AT A POINT 1,039.5 FEET (63 RODS) EAST OF THE SOUTH QUARTER CORNER OF SECTION 20, TOWNSHIP 101 NORTH, RANGE 14 WEST; THENCE NORTH AT RIGHT ANGLES TO THE SOUTH LINE OF SECTION 20, 462 FEET (28 RODS); THENCE WEST PARALLEL TO SAID SOUTH LINE 380.6 FEET, MORE OR LESS, TO THE WEST LINE OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SAID SOUTHEAST QUARTER; THENCE SOUTH ALONG A WEST LINE 462 FEET, MORE OR LESS, TO THE SOUTH LINE OF SECTION 20; THENCE EAST ALONG SAID SOUTH LINE 380.6 FEET, MORE OR LESS, TO THE POINT OF BEGINNING FOR THE PARCEL HEREIN EXCEPTED.

PARCEL II: COMMENCING AT A POINT 23 RODS EAST OF THE SOUTHWEST CORNER OF THE SOUTHEAST QUARTER OF SECTION 20, TOWNSHIP 101 NORTH, RANGE 14 WEST; THENCE EAST TO THE WESTERLY RIGHT-OF-WAY OF THE EXISTING TOWNSHIP ROAD; THENCE NORTHWESTERLY ALONG THE WESTERLY RIGHT-OF-WAY OF SAID EXISTING TOWNSHIP ROAD TO A POINT DIRECTLY NORTH OF THE PLACE OF BEGINNING; THENCE SOUTH TO THE POINT OF BEGINNING AND THERE TERMINATING.

BMB  
54



When Recorded Mail To:

FIRST SAVINGS BANK  
PO BOX 85614 - 500 E  
SIOUX FALLS, SD 57118-5614

AP# WILHARM  
LN# 3008612

SPACE ABOVE THIS LINE FOR RECORDER'S USE

### ASSIGNMENT OF REAL ESTATE MORTGAGE

FOR VALUE RECEIVED, the undersigned hereby grants, assigns and transfers to  
WASHINGTON MUTUAL HOMELENDING INC  
2210 Enterprise Dr Florence, SC 29501 all the rights, title and interest of  
undersigned in and to that certain Real Estate mortgage dated July 5, 2001, executed by  
KEVIN WILHARM and PATRICIA WILHARM, husband and wife

to FIRST SAVINGS BANK

, and whose address is  
PO BOX 85614 - 500 E 60TH ST N, SIOUX FALLS, SD 57118-5614  
recorded on 7/11/01 10 AM, and recorded in Book/Volume No.  
page(s) as Document No. 493619 Mower  
County Records, State of Minnesota

on real estate legally described as follows:  
SEE ATTACHMENT "A"

TOGETHER with the note or notes therein described or referred to, the money due and to become due  
thereon with interest, and all rights accrued or to accrue under said Real Estate Mortgage.

BY SIGNING BELOW, Lender accepts and agrees to the terms and covenants contained in this  
Assignment of Real Estate Mortgage.

DATED: 7/20/01

FIRST SAVINGS BANK

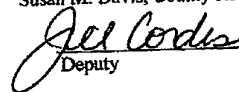


Michelle Kuiper, Vice President

OFFICE OF COUNTY RECORDER  
MOWER COUNTY MINNESOTA

DOCUMENT NO. 500174

I hereby certify that the within instrument was filed in this  
office for record on 7/22/2002 at 9 AM PM  
Susan M. Davis, County Recorder

  
Deputy

STATE OF SOUTH DAKOTA )

);SS

COUNTY Minnehaha )

On 7/20/01 before me, the undersigned, a Notary Public in and for the said County  
to me

ATTACHMENT "A"

COMMENCING AT A POINT 23 RODS EAST OF THE SOUTHWEST CORNER OF THE SOUTHEAST QUARTER OF SECTION 20, TOWNSHIP 101 NORTH, RANGE 14 WEST; THENCE EAST 40 RODS; THENCE NORTH 28 RODS; THENCE WEST 40 RODS; THENCE SOUTH 28 RODS TO THE POINT OF BEGINNING AND THERE TERMINATING, MOWER COUNTY, MINNESOTA; EXCEPTING THEREFROM THE FOLLOWING TWO TRACTS OF LAND;

PARCEL I: BEGINNING AT A POINT 1,039.5 FEET (63 RODS) EAST OF THE SOUTH QUARTER CORNER OF SECTION 20, TOWNSHIP 101 NORTH, RANGE 14 WEST; THENCE NORTH AT RIGHT ANGLES TO THE SOUTH LINE OF SECTION 20, 462 FEET (28 RODS); THENCE WEST PARALLEL TO SAID SOUTH LINE 380.6 FEET, MORE OR LESS, TO THE WEST LINE OF THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SAID SOUTHEAST QUARTER; THENCE SOUTH ALONG A WEST LINE 462 FEET, MORE OR LESS, TO THE SOUTH LINE OF SECTION 20; THENCE EAST ALONG SAID SOUTH LINE 380.6 FEET, MORE OR LESS, TO THE POINT OF BEGINNING FOR THE PARCEL HEREIN EXCEPTED.

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UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Kevin Wilharm

MEMORANDUM OF LAW

Debtor

Chapter 7, Case No. 04-33849  
-----

Washington Mutual Home Loans, Inc. n/k/a Washington Mutual Bank, FA ("Movant"), submits this memorandum of law in support of its motion for relief from the stay in the above-entitled matter.

**FACTS**

Movant holds a valid, perfected mortgage on real property owned by the Debtor. On the date of filing, the Debtor was delinquent under the note and mortgage. Since this case was filed Debtor has made no payments to Movant and the arrears total \$12,445.92.

**ARGUMENT**

1. Under Section 362(d)(2) of the Bankruptcy Code, relief from the automatic stay shall be granted upon request of a creditor "for cause, including the lack of adequate protection of an interest in property of such creditor." The Debtor in this case has failed to make payments required by the note and mortgage for a period of more than 14 months. Debtor has not otherwise provided Movant with adequate protection of its interest in the property. Such circumstances constitute cause, within the meaning of §362(d)(1), justifying relief from the stay.

In Re: Video East, Inc., 41 B.R. 176 (Bkrty. E.D. Pa. 1984); In Re: Frascatore, 33 B.R. 687 (Bkrty. E.D. Pa. 1983).

2. Pursuant to §362(d)(2) of the Bankruptcy Code, relief from the stay is appropriate where Debtor has no equity and the property is not necessary to an effective reorganization. 11 U.S.C. §362(d)(2). See, In Re: Gellert, 55 B.R. 970 (Bkrty. D. N. H. 1983). In this case the

balance due Movant is \$115,275.40. The value of the property is approximately \$90,000.00.

Clearly, the Debtor has no equity in the property, and as this is a Chapter 7 case, the property is not necessary to an effective reorganization.

### **CONCLUSION**

Movant is entitled to relief from the automatic stay pursuant to 11 U.S.C. §362(d)(1) for cause, where its interest in the secured property is not adequately protected. Movant is also entitled to relief from the automatic stay pursuant to 11 U.S.C. §362(d)(2) when Debtor has no equity, and when the property is not necessary to an effective reorganization.

Movant respectfully requests an Order of this Court modifying the automatic stay consistent with the attached proposed Order.

Dated: September 7, 2004

USSET & WEINGARDEN P.L.L.P

By: /E/ Paul A. Weingarden/Brian H. Liebo  
Paul A. Weingarden, #115356  
Brian H. Liebo #277654  
Attorney for Movant  
4500 Park Glen Road, #120  
Minneapolis, MN 55416  
(952) 925-6888

U.S. BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Kevin Wilharm

Debtor

UNSWORN DECLARATION  
FOR PROOF OF SERVICE

Chapter 7, Case No. 04-33849  
-----

Erin Kay Buss, employed on this date by USSET & WEINGARDEN, attorney(s) licensed to practice law in this court, with office address of Suite 120, 4500 Park Glen Road, Minneapolis, Minnesota 55416, upon penalty of perjury, declares that on September 7, 2004, I served the annexed Notice of Hearing and Motion for Relief from Automatic Stay upon each of the entities named below by mailing to them a copy thereof by enclosing same in an envelope with first class mail postage prepaid and depositing same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

Office of the United States Trustee  
1015 U.S. Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

Michael S. Dietz  
Chapter 7 Trustee  
505 Marquette Bldg, P.O. Box 549  
Rochester, MN 55903

Scott K. Springer  
Adams, Rizzi & Sween  
200 First Street NW  
Austin, MN 55912

Kevin Wilharm  
208 E. Cabot  
PO Box 552  
Le Roy, MN 55951

/E/ Erin Kay Buss  
Erin Kay Buss

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

-----  
In Re:

Kevin Wilharm

ORDER

Debtor.

Chapter 7, Case No. 04-33849  
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The above entitled matter came on for hearing upon motion of Washington Mutual Home Loans, Inc., n/k/a Washington Mutual Bank, FA ("Movant"), pursuant to 11 U.S.C. Section 362 on September 27, 2004, at the U.S. Bankruptcy Court, St. Paul, Minnesota. Appearances were as noted in the record. Based upon the evidence adduced at said hearing, the arguments of counsel, and the Court being fully advised of the premises,

IT IS HEREBY ORDERED THAT:

The automatic stay imposed by 11 U.S.C. §362 is hereby terminated as to the real property over which the Movant, its successors and/or assigns, has an interest, said property legally described as follows, to-wit:

Commencing at a point 23 rods East of the SW Corner of the SE 1/4 of Section 20, Township 101 North, Range 14 West; thence East 40 rods; thence North 28 rods; thence West 40 rods; thence South 28 rods to the point of beginning and there terminating; except a part of said parcel described as follows: Beginning at a point 1,039.5 feet (63 rods) East of the South Quarter Corner of Section 20, Township 101 North, Range 14 West; thence North at right angles to the South line of Section 20, 462 feet (28 rods); thence West parallel to said South line 380.6 feet; more or less, to the West line of the SE 1/4 of the SW 1/4 of said SE 1/4; thence South along a West line 462 feet, more or less, to the South line of Section 20; thence East along said South line 380.6 feet, more or less, to the point of beginning for the parcel herein excepted. Also excepting from the real estate to be conveyed the following described parcel: Commencing at a point 23 rods East of the SW Corner of the SE 1/4 of Section 20, Township 101 North, Range 14 West; thence East to the Westerly right-of-way of the existing Township road; thence northwesterly along the westerly right-of-way of said existing Township Road to a point directly north of the place of beginning; thence South to the point of beginning and there terminating. Subject to easement, restrictions and reservations of record.

Movant may proceed to foreclose its mortgage in accordance with Minnesota Statutes. Movant's request for attorneys fees and costs shall not be considered as this is governed by state law. Notwithstanding Federal Rules of Bankruptcy Procedure 4001(a)(3), this order is effective immediately.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2004.

\_\_\_\_\_  
Judge of the Bankruptcy Court